

Elmazovska (Migration) [2018] AATA 1551 (16 April 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Ms Hava ELMAZOVSKA

VISA APPLICANT: Mr Semir MUHAREM

CASE NUMBER: 1620196

DIBP REFERENCE: BCC2015/4123575

MEMBER: Shane Lucas

DATE: 16 April 2018

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211 of Schedule 2 to the Regulations; and
- cls.309.221 and 309.223 of Schedule 2 to the Regulations.
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- Statement made on 16 April 2018 at 3:31pm

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CATCHWORDS

Migration – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – Whether the parties are validly married – Parties validly married – Whether a genuine spousal relationship exists – Limited relevance of financial aspects – Relationship represented to others – Significant emotional support – Decision remitted with direction

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A, Schedule 2, cls 309.211, 309.221, 302.223

CASES

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STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 29 November 2016 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant is a Macedonian national born in Bitola on 14 February 1994. He applied for the visa on 31 December 2015 on the basis of his relationship with the sponsor ("the review applicant"). At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Relevantly to this matter, the primary criteria include cls.309.211, 309.221 and 309.223.
3. The delegate refused to grant the visa on the basis that the visa applicant did not meet the requirements of cl.309.211 of the Regulations, as the delegate was not satisfied that the visa applicant was in a genuine and continuing relationship with the review applicant. The delegate considered that the information and evidence submitted in support of the application was not sufficient to demonstrate that the applicant was the spouse of the sponsor, as defined under s.5F of the Act.
4. The review applicant seeks review of the delegate's decision.
5. The review applicant appeared before the Tribunal on 13 April 2018 to give evidence and present arguments. The visa applicant also gave oral evidence to the Tribunal. An additional three witnesses – being the mother of the review applicant, and the brother and sister of the visa applicant - made themselves available to provide evidence to the Tribunal. The additional witnesses had previously provided the Tribunal with Statutory Declarations regarding the genuine and continuing nature of the relationship between the parties. Accordingly, the Tribunal determined that it was not necessary to take oral evidence from the additional witnesses.
6. The review applicant was represented in relation to the review by a registered migration agent.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issues in the present case are whether the visa applicant was the sponsor's spouse for the purposes of the Act at the time of application (cl.309.211); whether at the time of decision, the visa applicant continues to satisfy the criterion in cl.309.211 (cl.309.221); and whether at the time of decision, the visa applicant continues to be the spouse of the sponsor (cl.309.223).

Relevant law

9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act; there must be a mutual commitment to a shared life as a married couple to the exclusion of all

others; the relationship must be genuine and continuing; and the couple must live together or not live separately and apart on a permanent basis [s.5F(2)(a)-(d)]. In forming an opinion about these matters, regard must be had to all the circumstances of the relationship. This includes evidence of the financial and social aspects, the nature of the parties' household, and their commitment to each other as set out in r.1.15A(3).

Are the parties validly married?

10. If the parties are validly married, they may meet the requirements of a spousal relationship. The applicants provided the Tribunal with evidence showing the marriage was made in Bitola, Macedonia on 24 July 2015. There is nothing to suggest the marriage is not valid. The Tribunal is satisfied on the evidence that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Whether the parties are in a spouse or de facto relationship

11. Clauses 309.211 and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case, the visa applicant claims to be the spouse of the review applicant. The review applicant was born in Dandenong, Victoria on 13 November 1992 and acquired Australian Citizenship by birth. Accordingly, the review applicant satisfies the requirements of cl.309.211(2)(a).

12. Are the other requirements for a spousal relationship met?

13. The applicants provided documentation to the Tribunal that was not available to the delegate. The Tribunal also had the benefit of hearing oral evidence from the review applicant and the visa applicant, and found both parties to be frank and credible.

14. Financial aspects of the relationship

15. The Tribunal received documentation and oral evidence detailing the financial aspects of the relationship. The review applicant stated that the couple opened a joint account in Macedonia in 2015, but that it is not used as the couple reside principally in separate countries. The Tribunal was provided with receipts of money transfers from the review applicant to the visa applicant via Western Union totalling some AUD 3900 between October 2015 and February 2018. In oral evidence, the review applicant stated that she provides the visa applicant with approximately AUD 100 a month to assist him with his day-to-day expenses. In oral evidence, the visa applicant stated that he resides with his parents and sister, and is not financially dependent on the review applicant. However, he stated that he uses the moneys provided to him by the review applicant to purchase clothing and other items, as he works on his parents' farm and does not have a regular income.
16. The review applicant also provided documentation and gave oral evidence attesting that the couple shared the cost of expenses for accommodation, meals and activities during her extended stays in Macedonia between July 2015-August 2015 and May-September 2017, and during holidays together in Vlore, Albania in June 2017 and Struga, Macedonia in August 2017. The review applicant also provided documentation from REST Industry Super attesting that the visa applicant is the sole beneficiary of the review applicant's superannuation account in the event of her death.
17. On consideration of the evidence, the Tribunal acknowledges that the parties have shared some day-to-day expenses; however the Tribunal found no evidence that the parties have pooled their financial resources in a substantive way or in relation to major financial

commitments. Moreover, the Tribunal found no evidence of any joint ownership of real estate or other major assets or any joint liabilities. The Tribunal is satisfied that the parties owe a legal obligation in respect of the other with regard to the visa applicant's status as sole beneficiary of the review applicant's superannuation account in the event of her death.

18. Given the constraints of residing in separate countries, the Tribunal accords little weight to the financial aspects of the relationship in this case.

19. Nature of the household

20. The Tribunal received documentation and oral evidence stating that the couple first met on 7 February 2015 during the visa applicant's visit to Australia from November 2014 to February 2015. The review applicant stated that the couple were introduced by a cousin of the visa applicant with the express purpose of potentially establishing a relationship. In oral evidence, the review applicant stated that she was immediately attracted to the visa applicant and that the couple went out together the day after their first meeting. The couple became engaged on 13 February 2015 at a party held at the review applicant's family home. The party was attended by members of both parties' families.
21. After the visa applicant's departure from Australia on 17 February 2015, the review applicant stated that the couple continued to develop their relationship over the telephone and through Facebook, and with the support and encouragement of their respective families. The review applicant travelled to Macedonia on 7 July 2015 with the intention of marrying the visa applicant, and the marriage was made in Bitola on 24 July 2015. On 29 July 2015, the marriage was celebrated at a formal reception attended by members of both parties' families, including the review applicant's mother, grandparents and brother.
22. Since their marriage, the couple have resided together at the visa applicant's family home on two occasions: for four weeks after their wedding in July 2015, and for four months in May-September 2017. The review applicant provided documentation and gave oral evidence regarding these periods of cohabitation, noting that she and the visa applicant shared a room in his parents' house and also spent time in hotels in Vlore, Albania and Struga, Macedonia while on short holidays together in 2017. The review applicant stated that she assisted with the housework, cooking and other domestic duties while living with her husband and his family, and also helped with the work of the family's farm.
23. On consideration of the evidence, the Tribunal found some evidence attesting to the living arrangements of the persons during their time together. The Tribunal is satisfied that the couple shared responsibility for housework and the work of the visa applicant's family farm. The Tribunal found no evidence of joint responsibility for the care and support of children.

24. Social aspects of the relationship

25. The Tribunal received detailed and credible Statutory Declarations regarding the development, and genuine and continuing nature of the relationship, from multiple members of their respective families in Australia and Macedonia. The Tribunal also received photographic evidence showing the couple – together and/or in the company of others – engaging in social activities with members of their respective families and friendship networks in Australia and Macedonia. The photographs depicted the couple at a range of formal and informal occasions, including their engagement party in Australia in February 2015; their wedding celebration in Macedonia in July 2015; at the visa applicant's home in Bitola in 2017; and on other social and religious occasions, including the celebration of Eid in June 2017 and the couple's second wedding anniversary in July 2017.

26. The Tribunal also received photographic evidence and other documentation regarding the couple's holidays together in Vlore and Struga in June and August 2017 respectively. These photographs appear spontaneous and casual, and show the couple engaging in social and recreational activities at various tourist destinations, and on other occasions with the visa applicant's friends and extended family members in Bitola.
27. On consideration of the evidence, the Tribunal is satisfied that the persons represent themselves to other people as being married to each other, and that the couple's family members and friends regard the relationship as a genuine and continuing one. The Tribunal is also satisfied that the couple plan and undertake joint social activities.

28. Nature of the person's commitment to each other

29. As stated above, the couple met in Australia in February 2015, having been introduced by the review applicant's cousin. Their relationship developed rapidly and was strongly supported by their respective families. After their marriage in Macedonia in July 2015, the couple resided together at the visa applicant's family home. The Tribunal was also provided with extensive documentation and received oral evidence regarding the couple's ongoing communication over the course of their extended separation between August 2015 and May 2017. The review applicant stated that the majority of their contact is through Facebook, and that the parties discuss both the minutiae of their daily lives and the prospect of a future life together in Australia. In oral evidence, the review applicant stated that the couple intends to live in Australia – at least initially – in an extension the visa applicant's brother has recently constructed for that purpose at his home in Melbourne. The review applicant stated that they would continue to save for a home of their own, and that she intends to complete her nursing studies.
30. The parties have now been married for over two-and-a-half years and have lived together as spouses (and are not living separately and apart on a permanent basis) on two occasions in that time. In oral and written evidence, the couple spoke knowledgeably and credibly about the inception and development of their relationship; the significant emotional support they provide to each other while apart through their regular communication on Facebook; and their practical and aspirational plans for a future together. In response to questions from the Tribunal, both applicants stated their shared intention of having four children.
31. On consideration of the evidence, the Tribunal accepts that the relationship between the couple has been extant for more than three years; that the couple has been married for over two-and-a-half years; and that the couple has lived together on two occasions over the course of their marriage, notwithstanding the constraints of principally residing in separate countries. The Tribunal is also satisfied that the couple draw on each other to a significant degree for companionship and emotional support, and that they view their relationship as being long term.
32. Having regard to all the circumstances of the relationship, the Tribunal is satisfied that when the application was made and at the time of this decision, the visa applicant and the review applicant had a mutual commitment to a shared life to the exclusion of others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied that the visa applicant and sponsor have lived together (and are not living separately and apart on a permanent basis) and have a shared commitment to a future as a married couple.
33. On the basis of the above, the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision. Therefore the visa applicant meets cls.309.211(2)(a), 309.221 and 309.223.

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36. **Conclusion**

37. Given the findings above, the appropriate course is to remit the application for a visa to the Minister to consider the remaining criteria for grant of a Subclass 309 visa.

DECISION

38. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211 of Schedule 2 to the Regulations; and
 - cls.309.221 and 309.223 of Schedule 2 to the Regulations.

Shane Lucas
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).